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No. 87-1455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Florida Power & Light Company ("FPL"), files this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.[1]

1 Pursuant to Rule 28.1, Petitioner incorporates by reference the list of parent company, subsidiaries and affiliates set forth in the Petition for Writ of Certiorari at ii-iv, with the following additions:

AAA CREDIT SERVICES, INC.
ANEW CORPORATION
ESI ENERGY, INC.
FPL FOUNDATION, INC. (Subsidiary)

REPLY TO RESPONDENT'S ARGUMENTS IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

I. The Clearly Erroneous Standard Must Be Reinforced.

Respondent, Westinghouse Electric Corporation ("Westinghouse") supports the Fourth Circuit's *de novo* resolution of this dispute in a manner which ironically emphasizes the need for this Court's further review. The Westinghouse theories are at odds with one another and demonstrate how far the Court of Appeals has strayed from its appropriate role.

Westinghouse first contends that the three opinions issued by the district court are materially inconsistent. (Brief in Opposition at 5, 8, 17). It suggests that these unidentified "fundamental inconsistencies" entitle an appellate court to disregard the trial court's findings and make factual findings on its own. This Court's review of the record will confirm that the district court never deviated from the pivotal factual findings first enunciated in the June 1981 opinion on liability: that Westinghouse assumed the risk of reprocessing, that FPL refused to accept the risk of commercial reprocessing as the means of disposal, and that the availability of commercial reprocessing was speculative and uncertain at the time of the contract. (87a-90a, 104a-105a, 109a, 136a-139a, 4aa).

Westinghouse next proposes that the Fourth Circuit's opinion is valid because it is consistent with the district court's initial opinion on remedies. (Brief in Opposition at 7, 12). Again a reading of the opinions reveals that the Fourth Circuit's independent findings are not in accord with any of the opinions of the district court, including the initial remedies opinion which was withdrawn on rehearing due to "errors of law." (121a)[2]

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2 The district court's first remedies decision focused on the finding that a basic assumption of the parties was that the spent fuel would be removed by Westinghouse from the plant site within a reasonable time. The district court initially excused Westinghouse on the ground that it was not foreseeable that Westinghouse would not be able to remove

(*footnote continued on next page*)

The district court never found, and indeed rejected Westinghouse's assertions, that commercial reprocessing was a developed and viable industry at the time of the contract and that Westinghouse would have realized a substantial profit from reprocessing. (89a-90a, 104a-105a, 109a, 136a-142a). The circuit court arrived at these entirely new factual conclusions with no assistance from the trial court. (20a, 54a-55a, 64a, 74a-77a).

Westinghouse's third rationalization claims that "both courts largely agreed on the critical facts." (Brief in Opposition at 2. See also Brief in Opposition at 8, 13). That assertion is difficult to fathom in light of its earlier positions. More importantly, the record is dramatically to the contrary. As detailed in FPL's petition, the fundamental factual findings of the district court and those of the circuit court are markedly polar. (See FPL's Petition at 10-12 & n.21, 17). The Fourth Circuit necessarily had to reject and replace the trial court's factual findings in order to reach its diametrically contrary ultimate holding. The circuit court's unapologetic excursion outside the boundaries of Rule 52(a) simply cannot be disguised.

Westinghouse concedes, as it must, that the Fourth Circuit opinion neither acknowledges Rule 52(a) nor explains why it should not apply. (Brief in Opposition at 14). Westinghouse urges instead some implicit application of the clearly erroneous standard. (Brief in Opposition at 8, 14). The circuit court's conclusory characterizations of the district court findings do not satisfy the analysis mandated by Rule 52(a). (See FPL Petition at 19 n.28).

Moreover, even if the Fourth Circuit had reviewed the *entire record* in light of the proper deferential standard, the court could not have found the trial court's findings clearly erroneous. "Where there are two permissible views of the evidence,

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the spent fuel within a reasonable time. (5aa). In contrast, the Fourth Circuit opinion attributed to the parties the mutual assumption that commercial reprocessing would be both available and profitable to Westinghouse and excused performance because commercial reprocessing was neither available nor profitable to Westinghouse. (64a, 74a).

the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The fact that every other court that has addressed the state of the commercial reprocessing industry has concurred with the district court here that the industry was fledgling, undeveloped and experimental, compels the conclusion that the district court's findings, at the very least, cannot be regarded as clearly erroneous. (See also FPL Petition at 17-19).[3] Further, even if the Fourth Circuit had properly applied Rule 52(a) *and* even if the court could legitimately conclude that some district court findings were clearly erroneous, the Fourth Circuit "should not simply have made factual findings on its own." *Icicle Seafoods, Inc. v. Worthington*, 106 S.Ct. 1527, 1530 (1986).[4]

Westinghouse also argues that the issue of whether Westinghouse's performance should be excused on the grounds of commercial impracticability is a legal issue to which the clearly erroneous standard does not apply. (Brief in Opposition at 16). The challenged opinion itself disposes of that view. The circuit court acknowledged that the determination of whether the defense of commercial impracticability applies to the facts of this case raises "factual questions," (31a, 32a), and proceeded to reject and replace the trial court's factual findings regarding the motives, expectations and assumptions of the parties and the historical setting out of which they arose. *See also Pullman-*

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3 Westinghouse's assertion that FPL has not disputed or cited evidence undermining the Fourth Circuit's findings regarding the history of commercial reprocessing is incredible. (Brief in Opposition at 8, 13, 15). FPL's Petition extensively discusses and rebuts the Fourth Circuit's anomalous account of the history of reprocessing and its unsupported finding that commercial reprocessing was "demonstrated," "practical and available." (See FPL Petition at 7-9, 10-13 & n.21, 16-19).

4 An appellate court fact-finding expedition is particularly abhorrent where, as here, the burden was on the appellant, Westinghouse, to prove in the trial court the facts it persuaded the circuit court to adopt. *See Panduit Corporation v. Dennison Manufacturing Co.*, 810 F.2d 1561, 1565 (Fed. Cir.) (opinion on remand from this Court's summary disposition and remand for further consideration in light of Rule 52(a)), *cert. denied*, 107 S.Ct. 2187 (1987).

Standard v. Swint, 456 U.S. 273, 287-290 (1982). The Fourth Circuit never bothered to dispute the purely factual nature of its inquiry. Indeed, the Fourth Circuit never challenged the rules of law applied by the trial court. Rule 52 plainly establishes the proper boundaries of the circuit court's review. The Fourth Circuit unabashedly exceeded these boundaries.

II. The Circuit Court's Impracticability Analysis Overlooks the Fundamental Concept of Risk Allocation.

The Fourth Circuit's potentially significant exposition of the doctrine of commercial impracticability incorporates a fundamental conceptual error. The court failed to recognize the concept of risk allocation as an essential element of the defense of commercial impracticability and, correspondingly, ignored the material evidence regarding Westinghouse's conscious, unqualified assumption of all risks associated with its contractual obligation to remove and dispose of the spent fuel "as it saw fit."

Westinghouse contends that this issue "is not worthy of review" because it "raises no issue of Federal law." (Brief in Opposition at 17). Forty-nine states, including Florida, have codified verbatim Section 2-615 of the Uniform Commercial Code, which establishes the elements of the defense of commercial impracticability.[5] The law of commercial impracticability, and, in particular, the element of risk allocation, is uniform throughout the country and does not present a unique question of local law. Consequently, the Fourth Circuit's voluminous and seemingly comprehensive decision, which excludes this element, may confuse and severely misdirect the understanding and application of this doctrine. Additionally, in view of the fundamental, direct conflict between the Fourth Circuit's analysis and that of all other common law decisions and treatises on this subject, this Court's supervisory power over federal courts provides a further, compelling basis for review.

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5 4 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-615, pp. 265-266 (3d Ed. 1983 and 1987 Cumulative Supp.). Mississippi is the only state to adopt a variation different from the Official Code. Mississippi's variation is not germane to the issue presented in this case.

Finally, Westinghouse contends that the Fourth Circuit did consider the allocation of risk element. (Brief in Opposition at 17-18). Again, the Fourth Circuit's own opinion belies that naked assertion. The Fourth Circuit articulated the set of standards it employed in analyzing the defense of commercial impracticability in this case:

> 'a party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable. When all those facts are established the defense is made out,' (49a, quoting from its earlier opinion in *Opera Company of Boston, Inc. v. Wolf Trap Foundation for the Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987)).

Conspicuously absent from the court's statement and analysis is consideration of the element of allocation or assumption of risk.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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